

TESTIMONY OF THE
CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESEVATION

PRESENTED BY E.T. "BUD" MORAN
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ON TRIBAL TRANSPORTATION
IN INDIAN COUNTRY

PRESENTED BEFORE THE COMMITTEE ON INDIAN AFFAIRS
OF THE UNITED STATES SENATE

AT A FIELD HEARING IN POLSON, MONTANA
ON THE FLATHEAD INDIAN RESERVATION

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Senator Tester and distinguished guests; as I said in my welcoming statement, it is an honor to be hosting this hearing on our Reservation and I am pleased to present this statement representing the position of my Tribes on transportation concerns and priorities of the Salish and Kootenai people. I ask that you please relay my regards to Committee Chairman Dorgan. He has been a great advocate for the Indian people and with his pending retirement from the Senate, please let him know that we will miss him and we wish him the best of luck in whatever venture he decides to pursue. I also ask that you send my regards to Senator Barrasso of Wyoming, the Ranking Member on this Committee. We have also appreciated his advocacy and understanding of our issues.

Let me start by stating that for far too long much of the basic infrastructure of almost every Indian Reservation in the United States was simply overlooked. The things that most Americans take for granted often are lacking on our homelands. Many do not have decent roads, drinking water and sanitation systems, or communications. Many do not have broadband or decent cell phone coverage. While all of us - and I am sure every member of the US Congress - would like to see the Indian people become more self sufficient and to raise levels of employment on our Reservations those things often are just not possible without basic infrastructure. I am always glad when Congress enacts legislation that might, for instance, include tax breaks or accelerated depreciation for businesses that locate on Indian reservations, however the truth is that you can enact tax breaks all day long but until we can ensure a business that they will have access to good infrastructure, none of them are likely to chose to build a business on reservation lands. You have probably heard the old story about a tourist out west who pulls into gas station and asks where the local Indian reservation starts. The answer is "the reservation starts where the highway ends." For many decades that was not just a joke but a pretty accurate portrayal of the roads in Indian County. Now things have gotten better, particularly on the Flathead Reservation but there are still many roads here – and it is worse on most other Indian reservations – where the

roads are severely substandard. The FY 2009 Indian Reservation Roads Program Relative Needs Distribution Factors Report found a backlog of \$13 billion for BIA system and Tribal roads to bring existing roads up to adequate design standards. Indian tribes still have the highest vehicle and pedestrian fatality rates found anywhere in the country and in a number of areas are three to four times the national average. The leading cause of death in many Indian communities is fatal car crashes and much of that is related to road conditions including both design and lack of maintenance. The problem is worsened when a responding ambulance (when there even is one), has to deal with the same roads and is delayed in its response. There are many studies showing the extent to which reservation roads are underfunded and poorly maintained when compared to comparable roads in off-reservation communities and urban areas.

The \$310 million included in the American Recovery and Reinvestment Act for Indian reservation roads was most appreciated and we thank President Obama and the Congress for enacting that bill. We were able to address some of our backlog of needed road repair and in so doing created much needed employment. We also were able to use ARRA funds for a bus transit project we've worked on together with the State of Montana.

Beyond the issue of road construction is a profound problem throughout all of Indian country relative to road maintenance. Not only has the Bureau of Indian Affairs (BIA) road maintenance program been underfunded but it has been stagnant at a rate of \$26 million annually for the entire United States for at least two decades. This is really a serious problem on the Flathead Reservation as I am sure it is elsewhere. We have been getting only \$190,000 a year for maintenance for the past six years. When some of earlier highway bills such as TEA-21 were enacted that included construction money from the Department of Transportation for Indian Country there was an understanding that those funds would supplement the budget of the Transportation Office of the Bureau of Indian Affairs, that the BIA would not be allowed to use new DOT funding to supplant existing BIA roads funds and that the BIA would continue to be primarily responsible for maintenance. The BIA did not live up to its end of that bargain and now, due to the totally unrealistic funding for maintenance from the Bureau, tribes had to secure a provision in the SAFETEA-LU bill of 2005 allowing them to reprogram up to 25% of their road construction money for maintenance. That legislation included language directing the BIA to continue to be primarily responsible for maintenance but as you can see from the stagnant \$26 million figure, the BIA, no doubt with pressure from OMB, has shirked that responsibility. So as a result, not only are roads in Indian Country dangerous due to lack of maintenance but they fall apart more quickly and then have to be rebuilt at far greater costs than if they had been maintained and resurfaced.

This year Congress was not able to enact a Highway Bill and the present program is funded only through the end of calendar year. We certainly hope it will be extended and that during the next Congress you will enact a Highway Reauthorization Bill. It is critical that such a bill includes a major Indian title, as has been the case for at least the last three Highway Authorization bills, and that you include Indian tribes throughout as much of the bill as is possible ensuring that we can access all appropriate programs. Over the course of the last two years Senator Dorgan circulated a discussion draft which was a comprehensive amendment to SAFETEA-LU known as the Tribal Reauthorization of Indian Programs or simply the TRIP Act. The discussion draft contained many provisions that would be tremendously helpful to Indian tribes including

increased appropriations for the Indian Reservation Road (IRR) program to \$800 million with stepped increases that would take the program to \$1 billion annually by FY 2015. It included significant increases for the Tribal Transit Program and the Tribal Bridge Program and established a Reservation Safety Program. It ensured increases in reservation road maintenance funding; allowed tribal access to other Federal programs and allows utilization of the Indian Self Determination Act as a vehicle for directly accessing DOT funds. Beyond these positive provisions that were in the TRIP Act there are various additional provisions we would like to see in the next highway bill. We support the increases proposed for transit and as stated above we used some ARRA funding to upgrade and purchase transit equipment but that money came through the State of Montana and they require matching funds on our part to operate the buses, so we hope there can be some money dedicated to tribal transit services in addition to equipment.

Somehow there also needs to be a requirement for counties and states to coordinate with tribes relative to roads that cross reservations where there are varying governmental entities, state, tribes and counties that might have jurisdiction over a the same but at various points along that road. We can't have one entity maintaining a road for a two mile stretch and then have a different entity ignore that same road in the next two mile segment. All transportation agencies need funding but there needs to be some direction for coordinating. Perhaps with the acceptance of Federal funds would require a commitment for coordination and an annual report describing that coordination.

Senator Tester, while I hope that you introduce the TRIP Act early next year, and while I understand the positive nature of many of the provisions contained in the conceptual Dorgan draft, I would not support your actions in introducing it if you did not first make a number of key changes. The IRR formula that the BIA is using, and that the Federal Land Highway Office is supporting, is now broken and **we will gain nothing from the TRIP Act if you don't fix it.** Let me give a rather startling example of why I feel this strongly.

Prior to the enactment of SAFETEA-LU, the national funding level for the IRR was \$275 million a year. Of that amount the Tribes in the Rocky Mountain Region (all tribes in Montana and Wyoming, except CSKT who are in the NW Region), got \$20 million. With the increased authorization in SAFETEA-LU the national funding level for the IRR increased to \$450 million. After that significant national increase the Rocky Mountain Tribes total allocation was \$19 million. Yes, with a \$175 million national increase, the Rocky Mountain Region tribes lost money! This is the region with some of the largest reservations and the most miles of roads of any in the country. On the Flathead Indian Reservation in 2006 we received \$1.3 million from the formula. In 2010 we will likely be receiving only about \$750,000 for a 1.3 million acre reservation. I don't understand how this is possible or how the BIA has not put an immediate halt to this drain of money from Tribal and BIA lands. This is because the IRR Inventory is being unethically and improperly manipulated by tribes and states that have learned how to game the system by adding thousands of miles to IRR Road Inventory for roads that should not qualify to be on such a list. The TRIP Act did nothing to change that. Senator, if this is not corrected and if the next Highway Authorization bill did manage to increase the funding level for the IRR to \$800 million, the tribes in Montana and Wyoming might end up going down

to a \$15 million share! This needs to stop and it should stop today. It does not require an act of congress or even new regulations. It simply requires the BIA to stop pretending this is not a crisis and to stop allowing the IRR Inventory system to be manipulated. Despite contentions to the contrary the changes they are suggesting in Question 10 of the IRR formula will not fix this problem. The Question 10 changes contain some improvements but nowhere near enough.

In 2006, 76% of the roads generating share in the BIA's nationwide Road Inventory were Tribal or BIA roads. Certainly these are the roads the program is intended for. That is why it is called the "Indian Reservation Road" program (emphasis added). This program is intended to construct, repair and maintain roads on Indian reservations and traveled by the Indian people who live on those reservations. These roads are on lands that the United States holds in trust and the program is a part of Federal governments fiduciary trust responsibility to federally recognized Indian tribes. The injury and death statistics used to justify the program certainly come from those on-reservation roads. Yet, in 2010 only 24% of the roads generating share in the BIA's nationwide Road Inventory are Tribal or BIA roads. Instead of being called the Indian Reservation Road program it should be changed to the "State and County Road Program Being Supplemented by the BIA." This is happening because certain tribes are adding thousands of miles of off-reservation state and county roads to their IRR inventories. In 2004 there were 62,000 miles in the national IRR Inventory. In 2010 there are 126,000 miles on this same inventory. So while we have remained stagnant or lost funds during times of large appropriations increases, tribes that are gaming the system are doing just the opposite. There is a tribe in Minnesota whose IRR funds went from \$700,000 to \$7.3 million over the course of two years. A tribe in Oklahoma gave \$20 million of IRR funds to the state of Oklahoma for Interstate Highway 44, a road that the State of Oklahoma is clearly responsible for. This will apparently help customers get to one of this tribe's numerous casinos. So while there are Indian people on reservations who can't get to their jobs, or their schools or to the hospital due to impassable roads, we have a situation where BIA roads fund are being used to supplant a state's responsibility for its own interstate highway system, a system and a road for which that State undoubtedly receives Federal Highway Trust Funds.

The formula used to allocate IRR funds is known as the Tribal Transportation Allocation Methodology (TTAM). The BIA continues to tell the Congress and the public that TTAM was a bi-product of a Negotiated Rulemaking Committee called for in the TEA-21 highway bill. What is not discussed is that after that rulemaking committee submitted its work to the BIA, the BIA made some rather substantial changes on its own. Those changes resulted in the manipulation of inventory data that has skewed the Cost to Construct (CTC) and Vehicle Miles Traveled (VMT) calculations for those tribes located near urban area and high volume highways.

IRR funds are allocated under formula known as the Relative Need Distribution Factor and it has three basic components: 1) Costs to Construct (CTC) 2) Vehicle Miles Traveled (VMT) and 3) Population (POP). In addition to on-reservation roads the formula allows tribes to include roads that "access" the reservation. Unfortunately, access is not defined. Without a definition the possibilities are endless. Senator, when you are in DC and fly out of Dulles Airport and are heading west on I-66 if you kept going far enough and connected to other highways you would eventually "access" an Indian reservation wouldn't you? Highway 93 crosses our reservation but just south of our reservation and slightly north of Missoula it intersects I-90. Should we claim

that as accessing our reservation? It gets better. Think if instead of Missoula there was a much larger urban city there, and think of the Vehicle Miles Traveled – the VMT part of the formula – on I-90. How many vehicles that traveled such a road and that didn't have a single Indian person inside can be claimed? The BIA is allowing tens of thousands of miles of such roads into the inventory including Interstates, National Highway System Roads, State, County and Township Roads. Most of these routes do not legitimately provide direct access to an Indian Reservation. A tribe in Wisconsin whose total land base is 4,600 acres now generates 800,878 Vehicles Miles Traveled on 2,436 miles of claimed roads in its inventory. This VMT is greater than the entire VMT for each of five BIA regions of the country.

Lest you think that these are simply the observations of a tribe who has seen nothing from the Congressional increases let me quote from a memo by the Interior Inspector General who examined this issue in a report entitled "*Department of the Interior Roads Programs – The Dangers of Decentralization*," dated February 1, 2010. The IG wrote: "We found significant inaccuracies in roads inventories that affect the ability of bureaus to identify needs correctly and inefficiencies in the processes that bureaus use to prioritize their needs". The report indicated that the BIA Roads Program "lacked sufficient safeguards to adequately detect misuse and mismanagement of funds." The report further indicated that the BIA did not have adequate inventories of its roads and it referenced the large increases in the BIA's national inventory of roads as being "unexplained."

Another major area of concern that tribes have can be found in the many miles of "proposed" roads that have been added to a number of tribes' inventories. These are roads that a tribe would like to build someday so they ask for and get funds from the IRR formula for them. The problem is that many of them will never be built. We have seen situations where Alaskan Villages are claiming proposed roads in wilderness areas or in areas where the terrain is such that 100 German engineers could not build a road. Yet as long as that proposed road remains on a tribe's list it will continue to get funded, year after year after year. There does not appear to be anything in the BIA's proposed Question 10 revisions that will change these problems.

When a road is added to a tribe's inventory it's pavement condition is supposed to be rated as to its actual degree of needed repair and for a paved road, if it gets a rating of 60 or less it can generate funding for the paved surface and the aggregate base under the surface at 100%. There are untold miles that have been added to the inventory that are all rated at exactly 60 which is nearly impossible. This means that someone sitting at a desk simply listed the road without a scintilla of a field examination. This practice has resulted in thousands of miles of non-BIA and non-Tribal roads generating funding at 100% with bogus data and at the expense of those tribes who choose not to cheat the system.

What is equally amazing is that after claiming these roads in their inventories, these same tribes don't actually do any work on them. With the exception of the Oklahoma tribe that gave that state \$20 million for I-44, we have never heard of a tribe actually doing work on the thousands of off-reservation miles claimed. They simply use the existence of the road to add it to their inventory and then spend it on something else, presumably transportation related but not on the claimed road. I am not an attorney but I wonder if this practice is not coming very close to being fraudulent. Additionally the statutes governing this program indicate that the funds are for road

“projects” and 23 USC 101(a) defines that term as “an undertaking to construct a particular portion of a highway.” It defines “construction” as “the supervising, inspecting, actual building and incurrence of all costs incidental to the construction or reconstruction of a highway.” Senator, if there is no “project” and there is no “construction” how are these roads qualifying?

Continuing with the remarkable situation is the fact that non-tribal and non-BIA roads that are added to tribal inventories are supposed to be added at what is known as a “Non-Federal Share” of the costs of the project. 23 USC 201(1) says that funds appropriated to carry out the Federal lands highway program may be used to pay the Non-Federal Share (NFS) of the costs of a project that provides access to or is within an Indian reservation. The non-Federal share is normally between 5% to 20% yet many of these roads are being funded at 100% of their costs. The issue of what percentage of costs a tribe should get is discussed in Question 10 of 25 CFR Part 170, Subpart C a key part of the IRR formula. On February 12, 2009, Senator Jeff Bingaman forwarded a letter from the Navajo Nation to the Interior Department and to Federal Highway Administration. The Chairman of the Navajo Nation’s Transportation Committee was expressing concerns similar to what you have heard from me today. Jeff Paniati, the Acting Administrator of the FHWA responded to the Senator on March 25, 2009 and in addressing concerns about funding for such non-BIA and non-tribal roads said,

“In the calculation that determines a Tribe’s share of the IRR Program funding, data from State routes generates funding only at the local match rate (typically 10 to 20 percent of their generated total.) “ [parenthetical included in original]

If Mr. Paniati is correct, there is a major violation of the regulations ongoing as there are quite literally thousands of miles of such exact roads being funded at 100%, not 10 to 20%.

The Paniati letter also said that,

“Interstates, although eligible for expenditure of IRR Program funding, are not included in the data entered into the distribution formula at all.”

Again, if Mr. Paniati is correct, there are further ongoing violations of the regulations and laws as there many miles of Interstate highways that tribes are absolutely including in their inventories that profoundly affect the distribution formula. How else could the tribe in Oklahoma have gotten \$20 million that it gave to the state?

Question 10 ostensibly tells us that two key factors in the IRR formula (Cost to Construct, CTC) and the aforementioned VMT, should be computed at the Non-Federal Share for matching funds if the road in question is otherwise eligible for other Federal Highway funds unless (see subpart 3) the public authority (i.e. State or County) responsible for maintenance of the road in question provides a) a certification of maintenance responsibility and b) a statement that it is unable to provide funding for the facility. When States accept Federal Highway funds from the United States they are required under 23 USC 116 to certify that they will maintain the project that the federal funds were used to construct. If they do not do so the federal government may cease all funding for road work in the state. I do not understand how a state that has certified it is responsible for maintaining its roads can then turn around with a wink and a nod and tell a tribe

that the state does not have the money to maintain the road so the tribe can claim it within its inventory. When tribes in Montana asked our State Highway Department if they would make such a statement they indicated that they would not and that they felt they would be perjuring themselves if they did. Beyond differing interpretations of the law by states, one of the many problems with how the BIA is implementing the formula is that it is not even being applied uniformly from one BIA Regional Office to another. Some regions will allow the inclusion of such roads and others will not.

In conclusion, I want to again thank the Committee and Senator Tester for convening this hearing. Transportation is very important for the Indian people. It directly affects health, safety and economic matters including jobs and the ability to attract businesses. We hope that the TRIP Act will be reintroduced next year. If the BIA does not thoroughly fix the misapplication of formula by a large number of tribes and the widely varying application of the formula that change from one BIA Regional office to the next, the Congress will need to do so via amendments to the underlying statutes.